Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 79-1894

JOYCE PAGNIELLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petition for Denial of a Request for a Writ of Certiorari to the Supreme Court of New Jersey

LEO P. COX,
Counsel for Respondent,

ALEXANDER D. LEHRER,
Monmouth County Prosecutor,
Monmouth County Prosecutor's Office,
Court House,
Freehold, New Jersey 07728
(201) 431-7160

N.J. Appellate Printing Co., Inc., So. Plainfield, New Jersey (201) 753-0200

TABLE OF CONTENTS

Opinion Below 1

Statement of the Case 2

Reasons for Denying the Writ:

The State Court's denial of a motion to admit an out-of-state attorney pro hac vice does not violate principles of due process, equal protection and Petitioner's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution 4

Conclusion 10

CASES CITED:

Burlington County Internal Medical Assoc. v. American Medicorp,
168 N.J. Super. 382 (Ch. Div. 1979) 4, 6

Cooper v. Hutchinson,
184 F.2d 119 (3d Cir. 1950) 8

Evans, In re,
524 F.2d 1004 (5th Cir. 1975) 8

Gideon v. Wainwright,
372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963) 4

Powell v. Alabama,
287 U.S. 45, 53 S. Ct. 77 L.Ed. 158 (1932) 4

Simon L. Leis, Jr., et al. v. Larry Flynt, et al.,
– U.S. –, 99 S. Ct. 698, 58 L.Ed.2d 717 (1974) . 4, 9

State v. Kavanaugh,
52 N.J. 7, 243 A.2d 225 (1968) 4, 8

TABLE OF CONTENTS

Thomas v. Cassidy,
249 F.2d 91 (4 Cir. 1957) cert. den. Fitzgerald v. Cassidy, 355 U.S. 958, 78 S. Ct. 544, 2 L.Ed.2d 533 (1958) 4

United States v. Laura,
607 F.2d 52 (3d Cir. 1979) 7

U.S. CONSTITUTION CITED:

Amendment VI 4

Amendment XIV 4

RULES CITED:

R. 1:6-2 7

R. 1:21-1(a) 5

R. 1:21-2 5

TABLE OF CONTENTS

APPENDIX

Appendix A

Letter of Denial from the Honorable Patrick J. McGann, Jr., J.S.C. 1a

Appendix B

Order Denying Motion to Admit Counsel Pro Hoc Vice 2a

Appendix C

Order on Motions/Petitions 3a

Appendix D

Order of the Supreme Court of New Jersey Denying Motion for Leave to Appeal Order Entered by Superior Court of New Jersey 4a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No.

JOYCE PAGNIELLO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

Petition for Denial of a Request for a Writ of Certiorari to the Supreme Court of New Jersey

---

The State of New Jersey, your Respondent, respectfully prays that this Honorable Court Deny Petitioner's request that a Writ of Certiorari be issued to review the judgment of the Supreme Court of New Jersey, entered in the above entitled matter on April 7, 1980.

OPINION BELOW

The Respondent, State of New Jersey, accepts the Petitioner's Statement of the Opinion Below as accurate.

STATEMENT OF THE CASE

Petitioner, Joyce Pagniello, seeks review of the opinionless decisions of the New Jersey Superior Court, Law Division of Monmouth County and the Appellate Division, and the New Jersey Supreme Court denying her Motion to Admit an Out of State Attorney Pro Hac Vice.

On September 26, 1979, Joyce Pagniello and her husband Dominick Pagniello were arrested in the Borough of Sea Bright, Monmouth County, New Jersey. Both were charged with violations of the New Jersey Controlled Dangerous Substance Act.

On that date the Monmouth County Narcotics Strike Force, together with the Drug Enforcement Agency made an undercover cocaine buy from Jeffrey Woods. Woods was given $2,200.00 of marked money in exchange for the cocaine. During the course of the transaction the undercover official was told by Woods that his source Dom first sold five pounds of cocaine and was sitting on another two pounds.

After the transaction was completed, the police followed Jeffrey Woods to the Pagniello's apartment in Sea Bright, New Jersey. A search warrant was obtained for the Pagniello apartment where a quantity of cocaine and methamphetamine, together with the marked $2,200.00 given by the undercover officer to Jeffrey Woods was found.

Subsequently, the matter came before the Sea Bright Municipal Court for a probable cause hearing in which petitioner was represented by Theodore Simon, Esquire, of Philadelphia, Pennsylvania. Probable cause was found and the case was thereafter presented to a Monmouth

County Grand Jury which indicted all parties in a seven count indictment.[1]

Petitioner, Joyce Pagniello, was charged in Counts Five and Six with Possession and Possession With Intent To Distribute Cocaine and Methamphetamine.

On January 4, 1980, the date set for arraignment, defendant Joyce Pagniello moved before the Honorable Patrick J. McGann, Jr., J.S.C., for an order permitting Theodore Simon, Esquire, a member of the Pennsylvania Bar, to represent her pro hac vice. That motion was denied by Judge McGann by letter dated January 8, 1980 (App. A, Page 1a). On January 14, 1980, a formal order denying the defendant's application was entered (App. B, Page 2a). No hearing on the matter was held nor was one requested by the defendant.

On January 29, 1980, the petitioner appealed to the Appellate Division of Superior Court for Leave to Appeal the Order denying defendant's Motion to Admit an Out of State Attorney. On February 20, 1980, the Appellate Division denied the Motion for Leave to Appeal in an opinionless per curiam order (App. C, Page 3a). On March 7, 1980, the same matter was appealed to the New Jersey Supreme Court. On April 7, 1980, the New Jersey Supreme Court, in an opinionless per curiam order, denied defendant's Motion for Leave to Appeal (App. D, page 4a).

On May 30, 1980, Judge McGann denied defendant's motion for a stay of all proceedings pending this Honorable Court's review of the defendant's petition for a Writ of Certiorari.

---

1. A third person, Jeffrey Woods was also indicted for narcotics law violations related to those with which the Pagniellos were charged.

REASONS FOR DENYING THE WRIT

The State Court's denial of a motion to admit an out-of-state attorney pro hac vice does not violate principles of due process, equal protection and Petitioner's rights guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The State of New Jersey does not contest defendant's position that the Sixth Amendment to the United States Constitution guarantees to an accused the assistance of counsel for his or her defense in a criminal matter. *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932). The State further concedes that the Fourteenth Amendment to the United States Constitution provides that same right to a defendant in a State criminal prosecution. *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963).

It is, however, a basic proposition of both federal and New Jersey case law that a defendant is not entitled to representation by the specific attorney of his or her choice when that attorney is not a member of the bar of the State in question. *Thomas v. Cassidy*, 249 F.2d 91 (4 Cir. 1957), *cert. den. Fitzgerald v. Cassidy*, 355 U.S. 958, 78 S. Ct. 544, 2 L.Ed.2d 533 (1958); *State v. Kavanaugh*, 52 N.J. 7, 243 A.2d 225 (1968) and cases cited therein; *Burlington County Internal Medical Assoc. v. American Medicorp*, 168 N.J. Super. 382 (Ch. Div. 1979).

This Honorable Court has noted the prevalence of pro hac vice appearances in American courts and suggested that due to the trend toward specialization and the high mobility of the bar, that this might well be a practice to be encouraged. *Simon L. Leis, Jr., et al. v. Larry Flynt, et al.*, – U.S. –, 99 S. Ct. 698, 700, 58 L.Ed.2d 717

(1974). But it also stated, with respect to an attorney's right to appear in the courts of a state in which he is not licensed:

> [I]t is not a right granted either by statute or the Constitution. Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions. 99 S. Ct. at page 700.

There is no right of federal origin that permits a lawyer to appear in state courts without meeting the bar admission requirements of that particular state. The Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another. *Id.* at 701.

New Jersey Court Rule 1:21-2 [2] governs pro hac vice appearances by out-of-state attorneys in the courts of that

---

2. *1:21-2. Appearances Pro Hac Vice*
An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual, or a member or employee of a partnership, or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this State, of good standing, who is not domiciled in this State and who does not maintain in this State his principle office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this State who is domiciled in and maintains a bona fide office for the practice of law in this State or maintains in this State his principal office for the practice of law; and who is therefore, pursuant to *R.* 1:21-1(a) authorized to practice in this State; provided, however, that all pleadings, briefs and other papers filed with the court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted attorney therein.

state. The rule clearly makes the approval of pro hac vice applications discretionary with the court in which the matter is pending. In *Burlington County Internal Medical Assoc. v. American Medicorp, supra,* the Court set forth four areas of proof which must be established by the applicant seeking pro hac vice admission.

The State does not doubt that Theodore Simon could, if required, produce the necessary documents to meet the first three tenors of proof: good standing to practice law; competence as an attorney, particularly in the instant specialty; and the defendant's desire to be represented by Mr. Simon. However, the fourth tenor of proof, good cause, is lacking.[3] Nothing presented by petitioner reveals the instant case to be one involving a particularly complex field of law. Petitioner is charged with Possession and Possession With Intent To Distribute Controlled Dangerous Substances. It should also be noted that Petitioner and Mr. Simon do not have a long standing attorney-client relationship. Petitioner contacted Mr. Simon for the first time shortly after her arrest and before the probable cause hearing at the Sea Bright Municipal Court.[4] Further, there is no dearth of New Jersey counsel with expertise in the defense of narcotics law violations.

---

3. The Court in *Burlington County Internal Medical Assoc., supra,* at p. 384, set forth a checklist of what may constitute good cause:

   a. A complex field of law in which counsel is a specialist.
   b. A long held attorney-client relationship.
   c. Lack of local counsel with expertise in the field involved.
   d. The existence of legal questions involving the law of the foreign jurisdiction.
   e. The need for extensive discovery proceedings the foreign jurisdiction.

4. See Petitioner's Brief at page 6.

Petitioner argues that her Sixth Amendment right to counsel has been violated by the Monmouth Country trial court's refusal to admit Mr. Simon pro hac vice. To support that contention, Petitioner argues that no hearing was held and, therefore, no reasons for the denial were advanced by Judge McGann.

At no time did Petitioner request a hearing on this matter. Indeed, Petitioner's original motion was made, in accordance with *R.* 1:6-2, under which oral argument is deemed to be waived.[5] The State submits that by failing to request it, the right to a hearing was waived. Petitioner relies on several cases which she argues require that a hearing be held and reasons given for the denial of a pro hac vice application. In particular, she relies on *United States v. Laura*, 607 F.2d 52 (3d Cir. 1979). The *Laura* case, heard in the Eastern District of Pennsylvania involved the dismissal of local counsel–which local counsel was required by the rules of the Eastern District–without a statement of reasons by the court. Defendant Laura's primary counsel, who was not dismissed, was not a member of the Pennsylvania Bar, but was a member of the New Jersey Bar. The *Laura* case is distinguishable from the case at bar in that it was a federal prosecution, where different eligibility requirements for admission before the court exist, and in that the attorney involved had previously been admitted to represent Mrs. Laura and was subsequently removed without a hearing or a statement of reasons for the dismissal. There, the 3rd Circuit Court of Appeals held that counsel cannot be dismissed without a hearing and a statement of reasons for the dismissal. The court

---

5. *R.* 1:6-2 Form of Motion, reads in pertinent part, "If no objections are timely filed, and unless otherwise ordered by the court, oral argument shall be deemed to be waived."

went on to say that a defendant does not have the right to select a particular person as his counsel as an absolute right, but that the arbitrary dismissal of a defendant's counsel of choice does violate a defendant's Sixth Amendment right to counsel. *Id.* at 56-57.

Petitioner also relies on *Cooper v. Hutchinson*, 184 F.2d 119 (3d Cir. 1950) to support her general proposition. The New Jersey Supreme Court, in *State v. Kavanaugh, supra,* at page 19, noted that the *Cooper* case says only that a constitutional issue is raised if an attorney admitted pro hac vice is removed in midstream for no reason at all and without a chance to be heard.

Petitioner also relies on the case of *In re Evans*, 524 F.2d 1004 (5th Cir. 1975) in which a federal appeals court issued a writ of mandamus compelling the United States District Court for the Southern District of Mississippi to admit an attorney to appear pro hac vice in a tax matter. This case can also be distinguished from the case at bar in that it too was a federal matter with admission requirements that are different than in the State Courts. Admission in the federal courts generally requires only admission to any state bar. That, of course, is not the case for admission to the New Jersey Bar where admission is contingent upon successful completion of a written examination on New Jersey law.

Petitioner has been charged with crimes involving no particularly complex area of the law. There has been no showing that her defense could not be undertaken by any number of New Jersey attorneys with expertise in that particular field of law. There are no legal questions or discovery proceedings involving the law of foreign jurisdictions to be resolved. As the New Jersey Supreme Court has stated:

> "There is nothing provincial about the requirement for admission to practice in the Courts of a State. The Courts of every jurisdiction must have control of practice before them as an "incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." *State v. Kavanaugh, supra,* at 19.

The State of New Jersey submits that none of Petitioner Joyce Pagniello's constitutional rights have been violated by the denial of the pro hac vice application. Certainly, this Honorable Court has decided that Theodore Simon does not have a constitutional right to appear in the courts of a state in which he is not licensed. *Leis v. Flynt, supra.* On the facts of this case, denial of Mr. Simon's application was neither an abuse of the trial court's discretion nor a violation of petitioner's rights.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ALEXANDER D. LEHRER
Monmouth County Prosecutor

/s/ Leo P. Cox
LEO P. COX
Counsel for Respondent

APPENDIX A

LETTER OF DENIAL FROM THE HONORABLE PATRICK J. McGANN, JR., J.S.C.

Dear Mr. Silber:

The County Clerk has received and filed the entry of the not guilty pleas which were forwarded by messenger by you for the above defendants.

Also forwarded was a notice of motion to admit Theodore Simon Pro Hoc Vice for the purpose of representing Mrs. Pagniello. That motion is denied. *Burlington Co. Int. Med. Assn. v. American Medicorp Inc.*, 168 N.J. Super. 382 (Ch. Div. 1979).

It is, of course, inappropriate to represent both defendants. Please arrange to have a New Jersey attorney substituted for one or the other.

Very truly yours,

PATRICK J. McGANN, JR.
J.S.C.

PJMc/jc

CC: Paul Chaiet, Esquire
Theodore Simon, Esquire

APPENDIX B

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION: MONMOUTH COUNTY
INDICTMENT NO. 350-79

THE STATE OF NEW JERSEY,

Plaintiff,

vs.

JOYCE PAGNIELLO and DOMINICK PAGNIELLO,

Defendant.

ORDER DENYING MOTION TO ADMIT COUNSEL *PRO HOC VICE*

THIS MATTER having been opened to the Court by ALAN SILBER, ESQ., acting as attorney on behalf of defendant JOYCE PAGNIELLO herein, for an Order permitting THEODORE SIMON, ESQ. to enter this matter *pro hoc vice,* as attorney for said defendant; notice having been given to the MONMOUTH COUNTY PROSECUTOR; oral argument having been waived, pursuant to R. 1:6-2; the Court having considered the papers submitted in support of this Motion; and good cause appearing for the making of this Order;

It is on this 14th day of January, 1980,

ORDERED, that defendant's Motion for an Order permitting THEODORE SIMON, ESQ. to enter the matter as attorney, *pro hoc vice,* be, and the same is hereby denied.

/s/ P. J. McGANN
HON. PATRICK J. McGANN, JR., J.S.C.

APPENDIX C

ORDER ON MOTIONS/PETITIONS
(Filed February 21, 1980)

Moving Papers Filed—January 29, 1980
Answering Papers Filed—February 9, 1980
Date Submitted to Court—February 15, 1980
Date Decided—February 20, 1980

ORDER

This matter having been duly presented to the court, it is hereby ordered as follows:

Motion for leave to appeal denied.

Supplemental:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ Elizabeth McLaughlin,
Clerk

FOR THE COURT:

/s/
WILLIAM G. BISCHOFF
P.J.A.D.

Witness, the honorable William G. Bischoff , presiding Judge of Part E , Superior Court of New Jersey, Appellate Division, this 20th day of February , 1980.

/s/ Elizabeth McLaughlin
Chief of the Appellate Division

APPENDIX D

SUPREME COURT OF NEW JERSEY

M-663 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOYCE PAGNIELLO,

Defendant-Movant.

ORDER OF THE SUPREME COURT OF NEW JERSEY DENYING MOTION FOR LEAVE TO APPEAL ORDER ENTERED BY SUPERIOR COURT OF NEW JERSEY

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 7th day of April, 1980.

/s/ Stephen W. Townsend,
Clerk